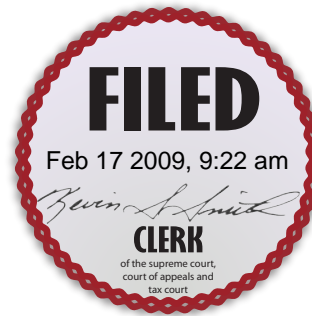


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MATTHEW KIRKHAM,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0807-CR-389

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Commissioner
Cause No. 49G06-0710-FC-229672

February 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Matthew Kirkham (“Kirkham”) appeals from the trial court’s sentencing order after pleading guilty to sexual misconduct with a minor,¹ a Class C felony. Kirkham presents the following restated issues for our review:

- I. Whether the trial court abused its discretion by imposing a two-year executed sentence; and
- II. Whether the trial court considered the elements of the offense or the particularized circumstances of the offense when imposing the sentence.

We affirm.²

FACTS AND PROCEDURAL HISTORY

On September 21, 2007, Kirkham, who was twenty-one years old, engaged in sexual intercourse with B.D., who was fifteen years old. B.D. advised Indianapolis Metropolitan Police officers that after one of her cross-country practices, B.D. went to Kirkham’s apartment and engaged in consensual sexual intercourse with him. Kirkham was B.D.’s volunteer assistant cross-country coach. Kirkham waived his Miranda rights and gave a statement to police officers admitting that he had consensual sexual intercourse with B.D. and that he knew she was fifteen years old.

Kirkham entered into a plea agreement with the State whereby he agreed to plead guilty to Class C felony sexual misconduct with a minor in exchange for a two-year cap on any executed sentence imposed. Kirkham pleaded guilty and was sentenced to a two-year

¹See Ind. Code § 35-42-4-9.

² Kirkham does not challenge his sentence on the basis that it is inappropriate in light of the nature of the offense and the character of the offender under Indiana Appellate Rule 7(B).

executed sentence. Kirkham now appeals.

DISCUSSION AND DECISION

Standard of Review

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.*

A trial court may abuse its discretion by failing to enter a sentencing statement at all. *Id.* A trial court may also abuse its discretion by entering a sentencing statement that: (1) provides reasons for imposing a sentence, including a finding of aggravating and mitigating factors if any, but the record does not support the reasons; (2) provides reasons that are improper as a matter of law; or (3) omits reasons that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a

sentence, a trial court cannot now be said to have abused its discretion in failing to “properly weigh” such factors. *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is. . .authorized by statute; and . . . permissible under the Constitution of the State of Indiana.” Ind. Code § 35-38-1-7.1(d).

I. Abuse of Discretion in Sentencing

Kirkham argues that “the trial court erred when it found that the mitigating circumstances . . . outweighed the aggravating circumstances, but then failed to explain why it chose to sentence [Kirkham] to the maximum executed time in spite of these findings.” *Appellant’s Br.* at 2. By “maximum executed time,” we assume that Kirkham means the maximum executed time pursuant to the sentencing cap in the plea agreement. Here, the trial court identified Kirkham’s guilty plea, lack of criminal record, and steady employment history as mitigating factors. The trial court identified Kirkham’s breach of his position of trust with B.D. as an aggravating circumstance.

The two-year executed sentence imposed by the trial court is properly supported by the trial court’s findings and sentencing statement. The two-year sentence is below the four-year advisory sentence for a Class C felony and reflects the trial court’s finding that the mitigating circumstances outweighed the aggravating factors. Further, the trial court did state that “there’s no benefit necessarily to incarceration.” *Tr.* at 51. However, the trial court stated that incarceration was appropriate in light of Kirkham’s breach of trust with B.D. The trial court did not abuse its discretion by imposing a two-year executed sentence here.

II. Improper Aggravating Circumstance

Kirkham claims that the trial court improperly considered the elements of the offense when imposing his sentence. Kirkham contends that the trial court erroneously considered a material element of the offense as an aggravating circumstance. More specifically, Kirkham points to the trial court's statement, during sentencing, that "particular crimes require incarceration in the Department of Correction simply by virtue of what has been done." *Tr.* at 36. Kirkham argues that the above statement supports his argument that the elements of the offense were considered as an aggravating circumstance.

It is true that a fact that comprises a material element of the offense may not also constitute an aggravating circumstance to support an enhanced sentence. *See Blixt v. State*, 872 N.E.2d 149, 152 (Ind. Ct. App. 2007). Nevertheless, a trial court may properly consider the particularized circumstances of the material elements of the crime. *Id.* The record supports the trial court's use of Kirkham's breach of his position of trust with B.D. when imposing his sentence. The record does not support Kirkham's argument that the trial court improperly considered elements of the crime when imposing Kirkham's sentence.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.